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OCTOBER TERM, 1976

Supreme Court of the United States

NO. _____

76-1394

STATE OF ALABAMA,

PETITIONER

VERSUS

KENNETH CANTRELL,

RESPONDENT

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH COURT
AND APPENDICES**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. _____

STATE OF ALABAMA,

PETITIONER

—VS—

KENNETH CANTRELL,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, the State of Alabama, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United State Court of Appeals for the Fifth Circuit entered in this proceeding on February 4, 1977, rehearing having been denied on February 28, 1977.

PRIOR OPINIONS

The decision of the Supreme Court of Alabama dismissing the respondent convict's appeal from his conviction for

murder is reported as: *Cantrell v. State*, 283 Ala 225, 215 So 2d 440 (1968). (Appendix "A")

The order of this court denying certiorari to review the above decision is reported as: *Cantrell v. Alabama* 394 U.S. 950, 22 L. Ed 2d 485, 89 S. Ct. 1290 (1969).

The order of the District Court denying the writ of habeas corpus is not reported but was styled:

Cantrell v. Alabama, No. Dist. Ala., C.A. 76-A-0203-J
(Appendix "B")

The decision and opinion of the United States Court of Appeals for the Fifth Circuit reversing the above order of the District Court is reported as:

Cantrell v. Alabama (5th Cir., 1977) 546 F. 2d 652
(Appendix "C")

JURISDICTION

The decision, opinion and judgment of the United States Court of Appeals for the Fifth Circuit was issued on February 4, 1977. A timely application for rehearing was denied by the said Court of Appeals on February 28, 1977, and this petition is filed within ninety (90) days of said date.

This Honorable Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Are the standards for judging the effective assistance of counsel the same for trials and appeals?

2. Does the Federal Writ of Habeas Corpus lie to review the application by State Courts of uniform state rules of appellate procedure to appeals of state convictions?

3. Assuming that a State prosecutor has a constitutional duty to advise the Court and defense counsel of a procedural error by the said defense counsel, does this duty extend to the prosecutor's checking up on defense counsel to see if he is rectifying the error and, if he is not, to the prosecutor's rectifying the error himself?

4. Does the Federal Writ of habeas corpus lie to review a claim of ineffective assistance of counsel by a state convict, where such claim is based on a procedural error by a competent and otherwise diligent attorney?

CONSTITUTIONAL PROVISIONS INVOLVED

A.

The Sixth Amendment to the Constitution of the United States, in particular the provision relating to the right to counsel:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

B.

The Fourteenth Amendment to the Constitution of the United States, Section One:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

28 United States Code, Section 2254, the same being submitted as Appendix "D" to this petition.

STATEMENT OF THE CASE

I.

SUMMARY OF THE STATEMENT

In 1968, the Alabama Supreme Court in accordance with its rules dismissed the appeal of the respondent convict from his conviction for Murder in the first degree on the grounds that the respondent convict's retained attorneys had not caused an adequate record on appeal to be filed in the Supreme Court. In 1969, this Honorable Court declined to review the action of the Supreme Court of Alabama. In 1976, the United States District Court denied the respondent convict a writ of habeas corpus on the grounds that the error of the convict's retained attorneys did not constitute State Action.

In 1977 the United States Court of Appeals reversed the District Court's order. The Court of Appeals held that the

respondent convict's constitutional right to the effective assistance of counsel on appeal had been violated by his retained attorneys. The Court further held that the fact that the State Attorney General had advised the appellate Court and the convict's retained attorneys of the defects in the record at a time when they could have been corrected made the retained attorneys' subsequent failure to correct the defects State Action. Finally, the Court of Appeals ordered the convict released absolutely unless the Alabama Supreme Court grants him an out-of-time appeal.

The prospects for an out-of-time appeal, should the writ issue, are not good.

II.

STATEMENT

This statement of the case is based entirely on the three decisions which are appended hereto as Appendices "A", "B" and "C".

The Respondent Convict, Kenneth Cantrell, was convicted of Murder in the first degree and appealed to the Supreme Court of Alabama. He was not an indigent and was represented at trial and on appeal by retained counsel.¹ The record on appeal was filed in the Supreme Court of Alabama on May 26, 1966. On August 15, 1966, the Attorney General moved to dismiss the appeal on three different grounds:

The respondent was represented by the firm of Beddow, Embry and Beddow of Birmingham, Alabama. They were and are outstanding and highly respected criminal defense attorneys.

1. The tardiness of the filing of the transcript of the evidence in the trial court.
2. The tardiness of the filing of the record in the Supreme Court.
3. The failure of the record to contain the requisite clerk's certificate.

On the same day, the Attorney General served a copy of the motion on the respondent's retained attorneys by mail. The case was argued and submitted on December 8, 1966. *Cantrell v. State* 283 Ala 225, 226, 215 So 2d 440, 441-442 (1968) Appendix "A".

On March 8, 1968, the respondent's retained attorneys moved to set aside submission of the case. The Alabama Supreme Court addressed this motion thusly:

"The motion to set aside the submission, as we understand it, concedes that the record is defective and contains this statement: 'Knowledge of the imperfection was not known to the appellant until the filing of the supplementary brief by the appellee on to-wit January 26, 1968.'²

"We cannot accept this statement as justifying an order setting aside the submission. Where an appeal is taken the appellant becomes responsible for the record on appeal to the extent of seeing that it is

² This quotation of an allegation in a pleading provides the basis for the Fifth Circuit's footnote 2. (Mns. Op. 1358, appendix "C", 546 F 2d 652, 653)

a correct record." (283 Ala 225, 226, 215 So 2d 440, 442, Appendix "A")

The Supreme Court of Alabama pretermitted consideration of the first two grounds of the State's Motion, i.e. those relating to the tardiness of the filing of the transcript and the record.³ The court ordered the record stricken and the appeal dismissed on March 14, 1968. *Cantrell v. State* 283 Ala. 225, 215 So 2d 440 (1968), Appendix "A".

A petition for a writ of certiorari was denied by this Honorable Court in *Cantrell v. Alabama* (394 U.S. 950, 22 L. Ed 2d 485, 89 S. Ct. 1290 [1969]).

The instant proceedings commenced with a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama, which was filed by the respondent on February 23, 1976.⁴ The respondent claimed that he was denied effective assistance of counsel on appeal as a result of his retained attorneys' failure to have the record on appeal properly certified. The District Court denied the writ on April 12, 1976, after finding that the error of defense counsel did not involve State Action within the meaning of the decisions of the United States Court of Appeals for the Fifth Circuit.⁵ *Cantrell v. Alabama* (No. Dist. Ala) C.A. 76-A-0203-J, Appendix "B"

³ The defects represented by these grounds were fatal to the appeal. *Albert v. State* 274 Ala 579, 150 So 2d 198 (1963); *Relf v. State* 267 Ala 3, 99 So 2d 216 (1957). Unlike the lack of a Clerk's Certificate, they could not have been remedied.

⁴ This is not to suggest that there had been no activity in the case during the intervening seven years. The respondent sought and received review of various alleged trial errors by state coram nobis and federal habeas corpus proceedings.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit. On February 4, 1977, the Court of Appeals reversed the denial of the writ by the District Court and ordered that the writ be issued to provide the respondent convict with an out-of-time appeal or release. The opinion of the Court of Appeals reached this conclusion by holding that the error of the respondent convict's retained attorneys was of Constitutional dimension and that the fact that the State's attorney knew about the error and advised the court and the retained attorneys about it at a time when it could have been corrected, made the failure of the retained defense attorneys to correct the error "State Action". *Cantrell v. Alabama* (5th Cir. 1977) 546 F 2d 652. Appendix "C". The State of Alabama's application for rehearing was overruled on February 28, 1977. Appendix "C".

III.

PROSPECTS FOR AN OUT-OF-TIME APPEAL

Should the writ issue, the State of Alabama would, of course, request the Alabama Supreme Court to grant the respondent convict an out-of-time appeal. The prospects for such a proceeding are, however, extremely dim. The problem is not the lack of a Clerk's Certificate, which is probably waivable, but the tardy filing of the transcript and the record. The Alabama Supreme Court pretermitted these points in

⁵ The State of Alabama's response to the petition was an alternative motion to dismiss or for summary judgment raising: (1) Lack of a Federal Question and (2) the fact that this claim had already been addressed in earlier habeas corpus proceedings. The District Court, while acknowledging the factual correctness of (2), declined to dispose of the petition on grounds of repetitiveness.

1968. Under the Rules which prevailed in 1968 and which would be applicable to the instant case, the timely filing of the transcript and record were considered jurisdictional. See, for example, *Bland v. State* 272 Ala. 215, 130 So 2d 385 (1961) and *St. John v. State* 54 Ala App 672, 312 So 2d 77 (1975). Thus, the petitioner state believes that the Alabama Supreme Court will probably hold that it has no jurisdiction to consider the appeal. This would result in the convict respondent being released absolutely. He could not be re-tried, since there is no defect in his conviction it would bar a subsequent prosecution.

SUMMARY OF THE ARGUMENT

I. The decision of the Court of Appeals would result in numerous strange paradoxes, the strangest being that by mishandling the convict's appeal his retained lawyers may well have rendered the convict's sentence unenforceable, something which they could not have accomplished by handling the appeal properly.

II. The convict makes no claim in this case that he has been denied equal treatment nor review of any alleged errors in his trial. His claim relates solely to a particular mode of review-appeal.

II. In reaching its decision the Court of Appeals made no distinction between the right to the effective assistance of counsel in Federal appeals or State trials on the one hand and State appeals on the other.

IV. Reasons for granting the writ:

A. The decision of the Court of Appeals conflicts with the decisions of this Honorable Court holding that,

while the right to counsel at trial is a due process right under the Sixth and Fourteenth Amendments, the right to counsel on appeal is an equal protection right only. *Ross v. Moffitt* 417 U.S. 600, 41 L. Ed 2d 341, 94 S. Ct. 2437 (1974)

B. In deciding this case under the doctrine of the effective assistance of Counsel on appeal the Court of Appeals evaded the issue. The real issue is whether or not Federal Habeas Corpus is available to review State court applications of State rules of appellate procedure to State cases. This Honorable Court has held that there is no U.S. Constitutional right to appeal. E.g. *Estelle v. Dorrough* 420 U.S. 534, 43 L. Ed 2d 377, 95 S. Ct. 1173 (1975) The States may regulate State appeals so long as the regulations do not work invidious discrimination. E.g. *Draper v. Washington* 372 U.S. 487, 499, 9 L. Ed. 2d 899, 907, 83 S. Ct. 744 (1963). Therefore, in ordering the writ issued in a habeas corpus action by a state convict complaining about the loss of appeal rights but not suggesting discrimination, the Court of Appeals ruled contrary to the prior decisions of this Honorable Court.

C. In holding that a State prosecutor has a duty to rectify errors of his opposing counsel, the Court of Appeals ruled contrary to the prior decisions of this Honorable Court. *Estelle v. Williams*, ____ U.S. ____, 48 L. Ed 2d 126, 135, 96 S. Ct. ____ (1976)

D. This Honorable Court has never directly ruled on the question of whether Federal Habeas Corpus is available to consider claims of the ineffective assistance of Counsel by State prisoners based on alleged errors of defense attorneys. There are practical problems with

using habeas corpus to review such claims. These include identifying errors of counsel and differentiating the errors from strategic decisions by counsel and the defendant himself. The fact that there is no time limit on habeas corpus makes it an inappropriate remedy from a practical point of view. The legal problems of using Federal Habeas Corpus to review such claims relate to the problem of State Action. The question here is whether a party's constitutional rights can be violated by his attorney's negligence. See 28 U.S.C. 2254(a) and *Estelle v. Gamble*, ____ U.S. ____, 50 L. Ed. 2d 251, 97 S. Ct. ____, (1976).

ARGUMENT

I.

INTRODUCTION

A.

THE STRANGE PARADOXES OF THE COURT OF APPEALS' DECISION

The decision of the United States Court of Appeals gives rise to numerous strange paradoxes. On the basis of an error by the respondent convict's retained attorneys, the Court of Appeals has ordered the writ issued. Yet, it is not these retained attorneys who will suffer the burdens of their error. The State's attorney will have to seek the out-of-time appeal for the respondent; the State's Supreme Court will have to reconsider a case which it has considered closed for nearly a decade, and the people of Alabama will have to pay for the

proceedings. *But, this is nothing.* If the Alabama Supreme Court determines for the reasons set out on page 8, above, that it cannot grant an out-of-time appeal, the convict respondent will be released absolutely. This will not be the result of the failure of the people of Alabama nor its Government to accord the convict respondent due process of law. The convict will not be released because of an act or omission by State officials but because of an omission by the attorneys selected and hired by the convict respondent.

The strangest paradox of all is this: If the convict respondent's retained attorneys had complied with the rules of appellate procedure, if they had caused the timely filing of a properly certified record, their client's appeal would not have been dismissed but would have proceeded to judgment. In such an event, the most that his retained attorneys could have obtained for the convict would have been a new trial. Yet, since the attorneys failed to comply with the rules, their client will probably be released. *In other words, the mis-handling of the respondent convict's appeal was the greatest service these retained attorneys could have rendered the convict.*

This is strange, paradoxical, unreasonable and grossly unjust.

B.

WHAT IS NOT AT ISSUE IN THIS CASE

Before addressing the matters raised in this petition it is necessary to point out what is *not* at issue. There is no claim of unequal treatment of the convict respondent; his appeal was dismissed pursuant to a uniform application of

well established appellate rules. Nor, is there any claim in this case that the convict respondent has a substantive claim of which he has been denied review; the convict has sought and obtained review of various alleged trial errors by State coram nobis proceedings, in which the trial transcript was entered as an exhibit, and by Federal habeas corpus proceedings. The convict's claim relates solely to a particular mode of review-appeal.

C.

THE OPINION OF THE COURT OF APPEALS

In reaching its decision the Court of Appeals relied on seven of its prior decisions. These decisions included cases involving effective assistance of counsel in Federal appeals of Federal convictions,⁶ in State trials;⁷ as well as in appeals of State convictions to State Courts.⁸ Obviously, the Court of Appeals drew no distinction between the question of the effective assistance of counsel under statutes and rules applicable to Federal appeals and the same question under the Constitution as it applies to State appeals. Nor, did the Court of Appeals distinguish between the question of the effective assistance of counsel as it applies to criminal trials as opposed to appeals. In failing to make these vital distinctions, the

⁶ **Arrastia v. United States** (5th Cir. 1972) 455 F.2d 736; **Kent v. United States** (5th Cir. 1970) 423 F.2d 1050; **Attilus v. United States** (5th Cir. 1969) 406 F.2d 694 Relief was granted in each case.

⁷ **Fitzgerald v. Estelle** (5th Cir., 1975) 505 F.2d 1334 Relief denied.

⁸ **Flanagan v. Henderson** (5th Cir., 1974) 496 F.2d 1274 Relief granted **Kallie v. Estelle** (5th Cir., 1975) 515 F.2d 588; cert. den 423 U.S. 1019, 46 L.Ed 2d 391, 96 S. Ct. 455; **Malone v. Alabama** (5th Cir., 1975) 514 F.2d 77 cert. den. 423 U.S. 990, 46 L.Ed 2d 309, 96 S. Ct. 430. Relief denied on the basis of the in banc decision in **Fitzgerald v. Estelle** (5th Cir., 1975) 505 F.2d 1334, *supra*.

Court of Appeals ruled contrary to the letter and spirit of the prior decisions of this Honorable Court.

II.

REASONS FOR GRANTING THE WRIT

A.

There is a Distinction Between The Right To Counsel At Trial and on Appeal

CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT

This point and the one argued under "II,B" immediately below, are related. This question is discussed first because the Court of Appeals cited the alleged ineffective assistance of counsel as its specific reason for ordering an out-of-time appeal or release for the convict respondent.

There are fundamental differences between the right to counsel at trial and on appeal. This Honorable Court has recognized these differences in *Ross v. Moffitt* (417 U.S. 600, 41 L. Ed 2d 341, 94 S. Ct. 2437 [1974]). No better analysis of these differences is possible than the following quotation from that case:

"... At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments, *Gideon v. Wainwright*, 372 US 335, 9 L Ed 2d 799, 83 S. Ct 792,

93 ALR2d 733 (1963). But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. Id. at 344, 9 LEd 2d 799, 93 ALR2d 733

"By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane v. Durston*, 153 US 684, 38 L Ed 867, 14 S. Ct 913 (1894). The fact

that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas v. California*, *supra*. Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis." 417 U.S. 600, 610-611, 41 L. Ed 2d 341, 351.

Of course, the respondent convict in this case was not an indigent at the time of his appeal; he was represented by retained counsel. However, if an indigent's right to counsel on appeal is to be measured by an Equal Protection Standard, equal protection itself demands that a non-indigent's rights be measured by the same standard. If this is the case, then a claim of ineffective assistance of counsel on appeal by a state prisoner presents no Federal Question under 28 U.S.C. 2254⁹ unless it is accompanied by a claim of discrimination. There is, of course, no such claim in this case, but a claim of discrimination in habeas cases claiming a denial of appeal rights would be jurisdictional.

The Fifth Circuit in failing to distinguish between the right to counsel at trial and on appeal and in ordering the writ issued in a case in which there was no claim nor evidence suggesting discrimination, ruled contrary to the prior decisions of this Honorable Court.

⁹ 28 U.S.C. 2254 (a):

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"

B.

FEDERAL HABEAS CORPUS IS NOT AVAILABLE TO REVIEW THE UNIFORM APPLICATION BY STATE APPELLATE COURTS OF STATE RULES OF APPELLATE PROCEDURE TO STATE CASES

CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT

The Fifth Circuit's deciding this case on the basis of the effective assistance of counsel was, with all due respect to the Honorable Court, an evasion of the real issue in this case. Appeals of criminal convictions must be brought by the persons convicted. As a practical matter, it is the appellant's attorney who must perfect the appeal. If there is a failure to comply with the rules of appellate procedure this will ordinarily be the result of an act or, more likely, an omission on the part of the appellant's attorney. In the Fifth Circuit's view, if such an error by a criminal appellant's attorney results in a loss of the appeal, there is a basis for a Federal claim of the denial of the effective assistance of counsel on appeal. Thus, a claim of the denial of the effective assistance of counsel becomes a probe by which the entire State appellate process can be examined and a lever by which State Court applications of State rules of appellate procedure can be set aside. But does Federal habeas corpus lie to review uniform applications of State rules of appellate procedure to State cases?

The Federal writ of habeas corpus is to be issued on behalf of State prisoners only to prevent continued incarceration of such prisoners in violation of their rights under the Constitution, laws and treaties of the United States. 28 U.S.C. 2254 (a) The question here is whether or not there

is a constitutional right to appeal, and, of course, there is none. *McKane v. Durston* 153 U.S. 684, 38 L. Ed 867, 14 S. Ct. 913 (1894); *Ross v. Moffitt* 417 U.S. 600, 41 L. Ed 2d 341, 94 S. Ct. 2437 (1974); *Estelle v. Dorrough*, 420 U.S. 534, 43 L. Ed 2d 377, 95 S. Ct. 1173 (1975). Therefore, appeal is a creature of State law. A State may, but need not, provide for appeal and, having created appeal, may abolish it. It follows, therefore, that having created appeal, a State may regulate it. Appeal may be limited, for example, to certain types of cases, or different modes of review may be provided for different types of cases or questions. *Kohl v. Lehlback*, 160 U.S. 293, 40 L. Ed 432, 16 S. Ct. 304 (1895) Time limits may be placed on appeal. *Oshkosh Water Works Co. v. Oshkosh*, 187 U.S. 437, 443, 47 L. Ed 249, 252, 23 S. Ct. 234 (1903). And, the right to appeal may be made dependent on compliance with appellate rules. *Meyer v. Hawaii* (9th Cir., 1947) 164 F2d 845, cert. den. 333 U.S. 860, 92 L. Ed 1139, 68 S. Ct. 738. The only constitutional restraint placed on the States in limiting the right to appeal is that the restraints must not work invidious discrimination. *Griffin v. Illinois* 351 U.S. 12, 100 L.Ed 891, 76 S. Ct. 585 (1956).¹⁰ *Draper v. Washington* 372 U.S. 487, 9 L.Ed 2d 899, 83 S. Ct. 744 (1963).¹¹ Therefore, the Federal writ of habeas corpus is not available to review the uniform application of State rules of appellate procedure such as caused the dismissal of

¹⁰ "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e.g., *McKane v. Durston*, 153 US 684, 687, 688, 38 L Ed 867, 869, 15 S. Ct. 913. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." 351 U.S. 12, 18, 100 L.Ed 891, 898. (Emphasis Supplied).

¹¹ ". . . Moreover, since nothing we say today [about the need to provide equal appellate review to indigents and non-indigents] militates against a State's formulation and application of operationally nondiscriminatory rules to both indigents and nonindigents in order to guard against frivolous appeals, the affording of a

the respondent convict's appeal. In order to confer jurisdiction on the District Court to inquire into allegations arising out of a State appeal process the habeas petition must allege discrimination.

In ordering the writ of habeas corpus issued to set aside a uniform application of State rules of appellate procedure by the Alabama Supreme Court, the Court of Appeals ruled contrary to the prior decisions of this Honorable Court.

C.

A STATE PROSECUTOR IS UNDER NO OBLIGATION TO RECTIFY APPARENT ERRORS OF DEFENSE COUNSEL

CONFFLICT WITH THE PRIOR DECISION OF THIS COURT

The Fifth Circuit ruled that the writ must issue, because the convict respondent's retained attorney failed to rectify the defects in the record after ". . . [t]he highest legal officer of the state, by written motion, called to the attention of the Supreme Court [of Alabama] and the appellant's retained counsel a defect which . . . , if unremedied, would require that the appeal be dismissed . . ." ¹² (Mns. Op. P. 1359, Appendix "C", 546 F. 2d 652, 654).

record of sufficient completeness to indigents would ensure that, if the appeals of both indigents and nonindigents are to be tested for frivolity, they will be tested on the same basis by the reviewing court." 372 U.S. 487, 499, 9 L.Ed 2d 899, 907 (Emphasis Supplied).

¹² This line of reasoning assumes that the defects were correctable. Assuming, for the sake of argument that the lack of a clerk's certificate was correctable, clearly the tardiness of the filing of the transcript and record could not have been corrected, unless, of course, counsel had access to a time-machine.

This raises the question of what duties a state prosecutor has after he realizes that his opposing counsel has erred, beyond calling the error to the attorney's attention.¹³ The Fifth Circuit obviously holds that a state prosecutor's duties go far beyond merely calling the error to the attention of the defense attorney. Presumably, that court holds that the State's Attorney in this case should have checked back with the defense attorneys to see if they were correcting the defects. If the State's Attorney had done this and learned that the convict respondent's retained lawyers were not correcting the defects, what then? Should the State's Attorney have tried to correct the defects himself? There are obvious problems with this; two of the three defects in the record could not have been corrected. To correct the third defect, the lack of the clerk's certificate, the State's Attorney would have had to make a showing of excusable neglect on the part of his opposing counsel. See Rule 18 of the Rules of the Alabama Supreme Court, quoted in note 6 of the Court of Appeals' decision, *Mns. Op.p. 1359*, Appendix "C", 546 F2d 652, 654. Of course, the State's Attorney had no way of knowing why the record was not certified.

In *Estelle v. Williams* (____ U.S. ____, 48 L.Ed 2d 126, 96 S. Ct. ____ [1976]) this Court wrote:

"... Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system . . ." 48 L.Ed 2d 126, 135

¹³ As will be discussed more fully below, merely identifying an error by opposing counsel is most often impossible.

The question in *Estelle* related to counsel at the trial level, where as discussed above at page 14 the right to counsel is a Sixth Amendment right. The Court of Appeals in the instant case did what this court refused to do *Estelle*, rewrite the duties of counsel. Under the opinion of the Fifth Circuit it becomes incumbent on prosecutors to not only advise their opposing counsel of the latter's errors but to be sure that these are corrected as well.

There is another problem here. The last three paragraphs of the Court of Appeals' opinion make it clear that the decision went off on the fact that the convict respondent's retained attorney failed to correct the defects in the record, after the State's Attorney gave notice of the defects. The third to last paragraph in the opinion reads:

"For almost four months, from around August 15, 1966, to oral argument and submission on December 8, 1966, the deficiency was remediable under the rules of practice then existent. [Footnote omitted]"¹⁴ Mn. Op. P. 1359, Appendix "C", 546 F2d 652, 654.

In other words, if the State's Attorney had delayed until oral argument to file his motion, the petitioner state would not be here now, since the defect would not have been remediable on or after the date of submission. Why? It would seem to make more sense to encourage prosecutors to point out errors to the defense, while they are remediable.

In any event, on this point, again, the Fifth Circuit has ruled contrary to the prior decisions of this Honorable Court.

¹⁴ The petitioner does not suggest that this statement is necessarily accurate.

**THE FEDERAL WRIT OF HABEAS CORPUS SHOULD
NOT BE AVAILABLE TO STATE PRISONERS TO
REVIEW MERE ERRORS BY DEFENSE ATTORNEYS**

A NOVEL QUESTION

This Honorable Court has never directly addressed the question of whether Federal Habeas Corpus, under 28 U.S.C. 2254, is available to State prisoners whose claims of ineffective assistance of counsel are based on mere errors of their attorneys.

The problems of using Habeas Corpus to review mere errors of defense attorneys fall into two categories: practical and legal.

First, there are the practical problems. The main difficulty here is in identifying an error of counsel at a time when something can be done about it. What appears to be an error of counsel may be the result of a strategy decision or the result of a decision by the accused or it may be a blunder.

This Honorable Court has recognized that what may appear to be errors, may reflect strategic decisions. *Estelle v. Williams*, ____ U.S.____, 48 L. Ed 2d 126, 135, 96 S. Ct.____ (1976) The examples of this abound. For example, a failure of defense counsel to object to a confession may be an error, or it may be the result of a strategic decision based on the facts that: (1) The accused has chosen not to testify; (2) the confession, while incriminating, puts the accused in a better light than the rest of the state's evidence, and (3) the confession is the accused's only opportunity to get his "story"

before the Jury.¹⁵

The case of *Taylor v. State* (291 Ala. 756, 287 So. 2d 901 [1973]; cert. den. 416 U.S. 945, 40 L. Ed 2d 298, 94 S. Ct. 1955) presents the classic example of what appeared to be an error by defense counsel but was in fact a defense thwarted by a decision of the accused. In that case, the defense counsel in a murder prosecution failed to introduce evidence which would have supported a claim of self-defense, because his client rejected his attorney's advice and refused to make such a claim.

It is most difficult for trial judges and prosecutors to detect defense errors and sort them out from strategy and the demands of the accused. There are, of course, no time limits on habeas corpus. When a petition is filed years after the event, the defense attorney himself may not recall why he did or did not do something. For this reason, the petitioner respectfully submits that questions relating to errors of counsel ought to be litigated at or near the time of trial by motions, hearings, motions for new trial, appeals and certiorari to this Court.

This Honorable Court has recognized that there are Federal Questions for which habeas corpus is an inappropriate remedy. *Stone v. Powell* ____ U.S.____, 49 L. Ed 2d 1067, 96 S. Ct.____ (1976) The petitioner respectfully submits that questions relating to alleged errors of defense attorneys, assuming that these are Federal Questions, are among the issues for which habeas corpus is not an appropriate remedy.

The legal problems with using habeas corpus to review alleged errors of defense counsel in state cases relate to the

¹⁵ This writer once handled a case where the defense successfully objected to a confession, then introduced as the only defense evidence the very confession which had been excluded during the state's case!

question of State Action. The Fifth Circuit itself has recognized that an error of counsel is not actionable under 28 U.S.C. 2254 unless there is some state action involved. *Fitzgerald v. Estelle* (5th Cir. 1975) 505 F 2d 1334; *Malone v. Alabama* (5th Cir. 1975) 514 F 2d 77; *Kallie v. Estelle* (5th Cir. 1975) 515 F 2d 588.

A private attorney is not a state official. He is not under the direct supervision of state officials. To provide such supervision it would be necessary for the State to somehow enter the confidential attorney-client relationship and to place restraints and mandates on private attorneys. This, even if it could somehow be made to pass constitutional muster, would totally undermine our adversary system of justice.

The Court of Appeals found State Action in the instant case in the fact that the State Attorney General knew about the defects in the appeal record after it was filed in the Supreme Court of Alabama. But, State Action must involve more than mere knowledge. If mere knowledge is sufficient then every time state or local officials learn of a crime which is in progress, the crime would become State Action. Clearly, State Action requires as a condition precedent that the state or its officials be in a position to control events, otherwise the state would be at the mercy of persons and things beyond its control.

In a recent decision, this Court held that the prohibition against cruel and unusual punishment could not be violated by mere negligence of *State Officials*. *Estelle v. Gamble*, ____ U.S._____, 50 L. Ed 2d 251, 97 S. Ct. Ct._____, (1976) The question in the instant case is whether or not the requirement of the effective assistance of counsel can be violated by the negligence of a private

attorney, merely because state officials at some point learn of the negligence. Your petitioner respectfully submits that mere negligence by a retained attorney is simply not State Action and, therefore, presents no Federal Question within the meaning of 28 U.S.C. 2254.

For the Criminal Law to achieve its desired effect of suppressing crime, Criminal Justice must be both swift and certain. In enforcing criminal laws the states must accord accused persons due process of law within the meaning of the Fourteenth Amendment. Therefore, if Criminal Justice is to be certain, the requirements of due process must be such that state officials can, by exercising reasonable diligence, follow them in every case. If an error of a defense attorney can deprive his client of due process, then the state is placed at the mercy of defense attorneys in meeting due process requirements. The State, because of the nature of our adversary system, can not exercise more than the most general control over defense attorneys, yet, in the Court of Appeals' view, a single bit of negligence by a defense attorney can wipe out the diligent efforts of the State Legislature, Judiciary and prosecutorial officials to meet the due process requirements. It is the duty of a defense attorney to avoid having a final conviction entered against his client. Why should a defense attorney work with diligence to protect his client's rights, when he can serve his client better by being negligent?

For all of these reasons, the State of Alabama respectfully submits that Federal Habeas Corpus under 28 U.S.C. 2254 should not be available to state prisoners to review claims of mere errors of counsel.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama respectfully submits that the decision and opinion of the Honorable

able United States Court of Appeals for the Fifth Circuit conflicts with the prior decisions of this Honorable Court and that this case presents an important question which has not been but ought to be addressed by this Honorable Court. For these reasons the State of Alabama prays this Honorable Court to issue a writ of certiorari to review the opinion, decision and judgment of the Honorable United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of Alabama

JOSEPH G. L. MARSTON, III
Assistant Attorney General of
Alabama

APPENDICIES

APPENDIX A

CANTRELL v. STATE

Cite as 283 Ala. 225

215 S. 2d 440

Kenneth CANTRELL

v.

STATE OF Alabama,

6 Div. 345,

Supreme Court of Alabama

March 14, 1968.

Rehearing Denied Nov. 21, 1968

Defendant was convicted in Circuit Court, Marion County, Bob Moore, Jr., J., and he appealed and the State moved to dismiss. The Supreme Court, Lawson, J., held that where record filed on appeal contained no certificate of clerk as to completeness and correctness of transcript as required by statute and Supreme Court rule, motion to strike transcript of record on appeal, transcript of evidence, and to dismiss appeal would be granted.

Beddow, Embry & Beddow, Birmingham, for appellant.

MacDonald Gallion, Atty. Gen., and Walter S. Turner, Asst. Atty. Gen., for the State.

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LAWSON, Justice

The record in this case was filed in this court on May 26, 1966. On August 15, 1966, the Attorney General filed a "Motion to Strike the Transcript of the Record on Appeal, Transcript of the Evidence, and to Dismiss the Appeal." The motion bears a certificate signed by an Assistant Attorney General to the effect that a copy of the motion was mailed to counsel for appellant on August 15, 1966.

The motion was based on three grounds; (1) For that the transcript of the evidence was not filed with the Circuit

Clerk within the time allowed by law; (2) for that the transcript of the record was not filed with the Clerk of this court within the time allowed by law; and (3) for that there is no certificated authentication of the record by the Clerk below as required by law.

[1] The cause was "Argued and Submitted on Motion and on Merits" on December 8, 1966. At the time of submission the Attorney General did not file a brief in support of the motion and appellant did not file a brief in opposition to the motion. Such briefs were, of course, not necessary to a lawful submission.

The writer of this opinion subsequently requested the Attorney General to file a brief in support of the motion. Such a brief was filed on January 26, 1968, and it appears by certificate that a copy of the brief was mailed to counsel for appellant on January 26, 1968.

On March 8, 1968, counsel for appellant filed two motions in this court; one seeks to have us strike the brief filed by the Attorney General on January 26, 1968, the other seeks an order setting aside the submission.

[2-4] The motion to strike the brief filed by the Attorney General on January 26, 1968, is, of course, denied. That brief was filed at our request. Such a request is not unusual. And, of course, counsel for appellant had the right to file a reply brief. The failure of the Attorney General to file a brief in support of the motion at time of submission did not constitute a waiver of the motion.

[5] The motion to set aside the submission is also denied. Counsel for appellant, according to the certificate attached to the motion, was advised on or about August 15, 1966, that the State through its Attorney General was contending that there were defects in the record which would require a dismissal of the appeal. But apparently no action was taken by counsel for appellant prior to submission to check the record

to determine if such defects did, in fact, exist and, if so, to take corrective action if such was available.

The motion to set aside the submission, as we understand it, concedes that the record is defective and contains this statement: "Knowledge of the imperfection was not known to the appellant until the filing of the supplemental brief by the appellee on to-writ January 26, 1968."

[6, 7] We cannot accept this statement as justifying an order setting aside the submission. Where an appeal is taken the appellant becomes responsible for the record on appeal to the extent of seeing that it is a correct record. *Henry v. Jackson*, 279 Ala. 225, 184 So.2d 133; *Northwestern Mutual Life Ins. Co. v. Mrs. Vivian W. Workman*, 283 Ala. 127, 214 So.2d 690.

We pretermit consideration of the first two grounds of the Attorney General's motion, inasmuch as the third ground is well taken and disposes of this appeal.

Section 767, Title 7, Code 1940, provides in part that the transcript shall include the clerk's "certificate that it is a complete transcript of all the proceedings in the cause."

Supreme Court Rule 24 incorporates this requirement of § 767, Title 7, supra, since it calls for inclusion in the transcript of "the certificate of the clerk to the correctness of the transcript."

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It has been held that an appeal will be dismissed if the transcript does not contain a certificate of the clerk of the Court from which the appeal is taken that it is a complete and correct transcript. *James v. State*, 42 Ala.App. 665, 177 So.2d 922, and cases cited; cert. denied, 278 Ala. 409, 177 So.2d 924.

[8] We have been unable to find in this record a certificate as is required by § 767, Title 7, supra, and by Supreme Court Rule 24. It follows that the Attorney General's motion

is well taken.

Motion granted; record stricken; appeal dismissed.

LIVINGSTON, C. J., and GOODWYN and COLEMAN,
JJ., concur.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

KENNETH CANTRELL,]	
Petitioner]	
v.]	CA-76-A-0203-J
STATE OF ALABAMA,]	
Respondent]	

O R D E R

Kenneth Cantrell, Petitioner, is an inmate of the Alexander City Work Release Center, Alexander City, Alabama. Petitioner is serving a sentence of life imprisonment imposed upon him in the Circuit Court of Marion County, Alabama, on November 11, 1965. Petitioner has submitted this his third petition for habeas corpus in which he alleges that his present confinement resulted from the denial of effective assistance of counsel to Petitioner in connection with an appeal from his conviction.

The State of Alabama has responded to a show cause Order and Petitioner has filed a Traverse thereto.

It is interesting to note that the petition in this case was filed by Petitioner with an indication that the petition was filed with the assistance of the Prison Research Council, University of Pennsylvania Law School. The participation in this case by members of the aforesaid research council, who are apparently law students, raises interesting questions which are not necessary for this Court to pass upon in this action.

In its response to the show cause Order, the State of Alabama suggests that this Court has heretofore ruled upon this contention by its failure to grant habeas relief in the previous petitions filed by Petitioner. The State of Alabama

is correct in its conclusion that in the previous cases filed by this Petitioner, this Court was of the opinion that the

[1]

position of Petitioner, as presented in the instant case, did not present a federal constitutional question. However, since this issue was not specifically treated by this Court in its previous Orders, the case will not be disposed of for the reason that it is repetitious.

Petitioner's appeal from his conviction was dismissed because of the failure of Petitioner's attorneys to comply with Title 7, Code of Alabama, Section 767, and Supreme Court Rule 24.

Based upon all the pleadings and exhibits in this case, the issue is clear and there is no factual dispute. In perfecting the appeal from Petitioner's conviction, the attorneys for Petitioner failed to secure from the Clerk of Marion County, Alabama, a certificate that the record on appeal was complete and correct. This, under the law of the State of Alabama, is an obligation of an appellant's attorney. The Supreme Court of Alabama has consistently held that the failure to obtain such a certificate will require the dismissal of an appeal on motion of the state. This was done. *Cantrell v. State*, 283 Ala. 225, 215 So.2d 440 (1968). The Supreme Court of the United States denied certiorari. *Cantrell v. Alabama*, 394 U.S. 950 (1969).

Petitioner's advocates have cited numerous authorities to this Court, none of which are controlling. Petitioner's advocates place great stress on the case of *Flanigan v. Henderson*, 496 F.2d 1274, 5th Cir. (1974). Reliance on this case is misplaced. In *Flanigan*, supra, the Court of Appeals for the Fifth Circuit remanded the case to the District Court for further proceedings. Several possible constitutional errors were noticed by the appellate court in *Flanigan*, supra which required a remand; the issue of adequate representa-

tion by counsel was merely one of the issues that the District Court was directed to consider. In *Flanigan*, supra, no decision was made by the U.S. Court of Appeals for the Fifth Circuit on the issue presented by Petitioner's advocates in the instant case.

— 2 —

The authorities which are binding upon this Court unquestionably hold that the factual situation in the instant case, based upon an alleged mistake by retained counsel, does not encompass the necessary state action to justify habeas relief by this Court. *Fitzgerald v. Estelle*, 505 F.2d 1334, 5th Cir. (1975); *Kallie v. Estelle*, 515 F.2d 585, 5th Cir. (1975); *Malone v. Alabama*, 514 F.2d 77, 5th Cir. (1975). Based upon the aforementioned authorities, this Court holds that the issue raised by Petitioner does not present a federal constitutional question.

It is therefore ORDERED that the petition for habeas corpus filed by Kenneth Cantrell be and the same hereby is DENIED.

The Clerk will furnish Petitioner, the Prison Research Council, University of Pennsylvania Law School, 3400 Chestnut Street, Philadelphia, Pennsylvania, 19174, and the Honorable William Baxley, Attorney General of the State of Alabama, with a copy of this Order.

DONE this 12th day of April, 1976.

C. W. ALLGOOD
United States District Judge

APPENDIX C

CANTRELL v. STATE OF ALA.

1357

Kenneth CANTRELL,

Petitioner-Appellant,

v.

STATE OF ALABAMA,

Respondent-Appellee

No. 76-2163

Summary Calendar.*

United States Court of Appeals,

Fifth Circuit.

Feb. 4, 1977.

Alabama state prisoner filed a petition for a writ of habeas corpus. The United States District Court for the Northern District of Alabama, Clarence W. Allgood, J., denied the writ and petitioner appealed. The Court of Appeals, Godbold, Circuit Judge, held that where the Alabama Attorney General moved to dismiss petitioner's appeal of his conviction because a transcript was not certified by the trial court clerk as required by Alabama law and the defect was remediable for almost four months until oral arguments and submission, retained defense counsel's failure to have transcript certified, resulting in dismissal of appeal, coupled with responsible state officer's knowledge of deficiency at time when it could have been corrected, resulted in denial to petitioner of his right to effective assistance of counsel.

Reversed and remanded.

Appeal from the United States District Court for the

* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Synopses, Syllabi and Key Number Classification

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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Northern District of Alabama.

Before GODBOLD, HILL and FAY, Circuit Judges.

GODBOLD, Circuit Judge:

This appeal requires application of the constitutional standards governing adequacy of representation by retained counsel, set out in *Fitzgerald v. Estelle*, 505 F.2d 1334 (CA5) (en banc), cert. denied, 422 U.S. 1011, 95 S.Ct. 236, 45 L.Ed.2d 675 (1975). The district court denied the writ of habeas corpus to appellant, a state prisoner. We reverse.

Appellant, represented by privately retained counsel, was convicted by an Ala-1358-bama jury of first degree murder and was sentenced to life imprisonment in November 1965. The events of his merits appeal are described in *Cantrell v. State*, 283 Ala. 225, 215 So.2d 440 (1968), cert. denied, 394 U.S. 950, 89 S.Ct. 1290, 22 L.Ed.2d 485 (1969). The record was filed in the Alabama Supreme Court on May 26, 1966. On August 15, 1966, the Attorney General of Alabama filed a motion to strike the transcript of the record and to dismiss the appeal because the transcript was not certified by the clerk of the trial court as complete and correct.¹ The motion bore the signed certificate of an Assistant Attorney General that he had mailed a copy of the motion to Cantrell's counsel.²

The case was orally argued and submitted to the Alabama Supreme Court for decision on December 8, 1966. Neither the Attorney General nor counsel for Cantrell had filed a brief relating to the motion to dismiss. So far as the record before the Alabama Supreme Court revealed, Cantrell's counsel took no action prior to submission to check the transcript to see if the alleged defect was present and, if so, to take corrective action. After submission the Supreme Court, on its own volition, asked the Attorney General to file a brief on

¹ As required by Tit. 7, § 767, Code of Alabama (1940).

² Defense counsel told the Alabama Supreme Court that he did not receive a copy of the motion. This does not affect the outcome of the case before us.

the motion to dismiss. The first action by Cantrell's counsel concerning the alleged defective transcript was in March 1967 when he filed motions to strike the Attorney General's brief on the motion to dismiss and to set aside the submission. The court denied Cantrell's motion to set aside the submission. It gave weight to the certificate of the Assistant Attorney General that on August 15 he had mailed to Cantrell's counsel a copy of the motion to strike and dismiss, which pointed out the fatal defect in the record. Adhering to its previous decisions,³ the court granted the motion to strike and dismissed the appeal.⁴

Under Fitzgerald there are two types of constitutionally ineffective assistance of privately retained counsel. The first occurs when the proceeding is "fundamentally unfair," that is, the criminal justice system has so grossly malfunctioned that the state's subsequent imprisonment or fine of the defendant is a violation of due process. 505 F.2d 1336. Fourteenth Amendment state action is present, not because a state official knew or should have known the particulars of the unfairness but because the system has failed. We do not need to address this prong in the present case.

The critical language of Fitzgerald with respect to the second type of ineffectiveness of retained counsel is this:

To find state involvement in retained counsel's conduct which is adjudged to be less than reasonably effective, yet not so grossly deficient as to render the proceedings fundamentally unfair, it must be shown that some responsible state official con-

nected with the criminal proceeding who could have remedied the conduct failed in his duty to accord justice to the 1359-accused. That the trial judge and the prosecutor have such a capacity and duty is unquestionable. Therefore, if the trial judge or the prosecutor can be shown to have actually known that a particular defendant is receiving incompetent representation and takes no remedial action, the state action requirement is satisfied. If they directly participate in the incompetency, it is even more so. Furthermore, if the incompetency of a retained attorney's representation is so apparent that a reasonably attentive official of the state should have been aware of and could have corrected it then again the state action requirement is satisfied.

Id at 1337 (emphasis added).

[1] Failure of counsel to perfect an appeal is a denial of constitutionally effective counsel, e. g., *Arrastia v. U.S.*, 455 F.2d 736 (CA5, 1972), *Kent v. U. S.*, 423 F.2d 1050 (CA5, 1970) (failure to file notice), *Atilus v. U.S.*, 406 F.2d 694 (CA 5, 1969). *Malone v. Alabama*, 514 F2d 77 (CA5), cert. denied, 423 U.S. 990, 96 S.Ct. 403, 46 L.Ed.2d 309 (1975), and *Kallie v. Estelle*, 515 F.2d 588 (CA5), cert. denied, 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed.2d 391 (1975), are post-Fitzgerald case which recognized the duties of retained counsel with respect to appeals but denied relief because no responsible state officer either knew or should have known of counsel's derelictions.

In *Flanagan v. Henderson*, 496 F.2d 1274 (CA5, 1974), counsel failed to take an appeal based on bills of exceptions at trial, with the effect that the appeal record was limited to the minute entries made by the trial court clerk. We held that counsel's failure had substantially harmed, if not, effectively thwarted, petitioner's appeal, and we reversed for de-

³ *James v. Alabama*, 42 Ala.App. 665, 177 So.2d 922 (1965); *Thomas v. Alabama*, 43 Ala.App. 487, 192 So.2d 746 (1966); *Tidwell v. State*, 41 Ala. App. 296, 130 So.2d 206 (1961); *Davis v. State*, 13 Ala.App. 309, 69 So. 338 (1915).

⁴ Cantrell has exhausted his state remedies. The Alabama court denied collateral relief by decisions handed down prior to Fitzgerald.

termination of whether petitioner had waived the appeal on the full record.

[2, 3] Concerning the Fitzgerald-required proof of knowledge, the present case is as clear a case as one could have of knowledge by a responsible state official. The highest legal officer of the state, by a written motion, called to the attention of the Supreme Court and the appellant's retained counsel a defect which under Alabama law, if unremedied, would require that the appeal be dismissed without consideration of its merits. The Attorney General asked for and secured dismissal of the appeal because of the mistake.⁵

For almost four months, from around August 15, 1966, to oral argument and submission on December 8, 1966, the deficiency was remediable under the rules of practice then existent.⁶

⁵ Even if defense counsel did not receive a copy of the Attorney General's August 15 motion, his failure to secure a certified transcript that would permit review of the case was in itself ineffectiveness of counsel. It is appellant's duty to see that the record on appeal is correct. See, e. g., **Orum v. State**, 286 Ala. 679, 245 So.2d 831 (1971); **Shadle v. State**, 280 Ala. 379, 194 So.2d 538 (1967); **Henry v. Jackson**, 279 Ala. 225, 184 So.2d 133 (1966); **Hopkins v. State**, 51 Ala.App. 510, 286 So.2d 920 (1973); **Rushing v. State**, 40 Ala. App. 361, 113 So.2d 527 (1959). See also, **Flanagan v. Henderson**, *supra*. The Attorney General had knowledge of the deficiency whether or not his awareness was called to the attention of the defendant's lawyer.

⁶ Rule 18 of the Supreme Court Rules of Alabama, in effect at the time, provided:

"A certiorari to perfect or bring up a complete record may be awarded, on motion of either party, at any time before the submission of the cause, if its object be to sustain a judgment, without a showing; but if to reverse a judgment, a sufficient showing must be made."

See **Morris v. State**, 268 Ala. 60, 104 So.2d 810 (1958); **Lane v. State**, 46 Ala. App. 637, 247 So.2d 679 (1971); see also **Adams v. State**, 291 Ala. 224, 279 So.2d 488 (1973); **Bowlin v. Bowlin**, 267 Ala. 655, 104 So.2d 630 (1958); **Jackson v. Lowe**, 48 Ala.App. 633, 266 So.2d 891 (1972); **Baker v. State**, 39 Ala.App. 221, 96 So.2d 821 (1957).

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CANTRELL v. STATE OF ALA.

Thus, counsel's ineffectiveness was of constitutional dimension, and a responsible state officer had actual knowledge of the deficiency at a time when it could have been corrected. Fitzgerald requires relief.

The decision of the district court denying habeas corpus is reversed and the case is remanded with instructions to grant the writ and require that Cantrell be permitted an out of time appeal or released.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2163

Summary Calendar

D. C. Docket No. CA-76-A-0203-J

KENNETH CANTRELL, Petitioner-Appellant,
versus

STATE OF ALABAMA, Respondent-Appellee
Appeal from the United States District Court for the
Northern District of Alabama
Before GODBOLD, HILL and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with instructions in ac-

cordance with the opinion of this Court.

ISSUED AS MANDATE: Feb. 4, 1977

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
FEBRUARY 28, 1977

EDWARD W. WADSWORTH TEL. 504-589-6514
Clerk 600 CAMP STREET
 NEW ORLEANS, LA. 70130

TO ALL COUNSEL OF RECORD

No. 76-2163—Kenneth Cantrell v. State of Alabama

Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition () for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
By Susan M. Gravis
Deputy Clerk

cc: Mr. Kenneth Cantrell

Mr. Joseph G. Marston, III

APPENDIX D

UNITED STATES CODE TITLE 28

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court

concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, one of the attorneys for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this ____ day of April, 1977, I did serve the requisite number of copies of the foregoing Petition for a Writ of Certiorari and Appendices on the Respondent, who is not represented by counsel, by mailing said copies to him, First Class postage prepaid, and addressed as follows:

Mr. Kenneth Cantrell
Prison No. 91688
Post Office Box 705
Alexander City, Alabama 35010

JOSEPH G. L. MARSTON, III
Assistant Attorney General
State of Alabama

Address of Counsel:
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250 Administrative Building
64 North Union Street
Montgomery, Alabama 36104